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No. 08-1188

Supreme Court, U.S.
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In the
Supreme Court of the United States

Gerald Robinson,

Petitioner,

v.

State of Ohio,

Respondent.

On Petition for a Writ of Certiorari to the Ohio Court of Appeals for the Sixth Appellate District

Petition for a Writ of Certiorari

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Question Presented

If due process of law means anything in a criminal case, it is protection of the individual from arbitrary government action, and the right of the accused to present evidence that undermines the credibility of the Government's case. In the 24 years of unjustifiable pre-prosecution delay in this case, expert witness testimony, occurrence witness testimony, forensic evidence and physical evidence, probative of actual innocence, was lost. Did Petitioner suffer actual prejudice at trial?

If the answer is "yes," then his due process claim was ripe for adjudication, under the first prong of the test announced in *United States v. Lovasco*, 431 U.S. 783 (1977). Accordingly, the Ohio appellate court should have adjudicated the claim by examining the legitimacy of this prosecution, under the second prong of the *Lovasco* test, to determine if the state of Ohio violated Petitioner's Due Process Rights.

Parties to the Proceeding

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Petition for a Writ of Certiorari

Petitioner, Gerald Robinson, respectfully submits this petition for a writ of certiorari to review the judgment of the Ohio Court of Appeals for the Sixth Appellate District.

Opinions Below

The opinion of the Ohio appellate court in *State of Ohio v. Gerald Robinson*, 2008-Ohio-3498 (Jul. 11, 2008), is not yet published but is electronically reported at 2008 WL 2700002. Pet. App. A-1. The opinion of the Lucas County, Ohio Court of Common Pleas is unreported. *Id.* at B-1.

Jurisdiction

The Ohio Supreme Court declined to accept jurisdiction to hear this case on December 31, 2008. *Id.* at D-1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

Constitutional Provisions Involved

The Fourteenth Amendment of the Constitution provides in relevant part: . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law. U.S. Const., amend. XIV., § 1.

The Fifth Amendment of the Constitution provides in relevant part: . . . [N]o person shall be . . . deprived of life, liberty, or property, without due process of law. U.S. Const., amend. V.

The Sixth Amendment of the Constitution provides in relevant part: . . . In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him, [and]

to have compulsory process for obtaining witnesses in his favor. U.S. Const., amend. VI.

Statement

Our fundamental concepts of justice clash head-on with the Government's interest in pursuing "cold" criminal cases when the passage of time impairs a defendant's ability to present of a rational theory of innocence to a jury. We ask this Court to revisit *United States v. Lovasco*, 431 U.S. 783 (1977), and strike the appropriate constitutional balance between the two competing interests, particularly important in the technological climate of today, by addressing the threshold due process question unanswered 32 years ago – when, in *Lovasco's* terms, is a pre-prosecution delay claim "ripe for adjudication?"[1] The answer to the question presented, especially in a circumstantial case like this one, requires a delicate application of the correct constitutional standard. This Court, as the final arbiter of our Constitution, must set that standard.

A Questionable Motive

1. The Lucas County, Ohio Prosecutor's renewed interest in this 1980 case occurred during the height of the politically driven, salacious, media-circus atmosphere of the Catholic Clergy child sexual abuse and cover up scandals of 2003.[2]

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[1] *Id.* at 790.

[2] This case was denominated by local and national media as Toledo's "crime of the century." And because the state of Ohio linked Catholicism to the occult, *see* pp. 13-15, the trial was covered live on Court TV.

Prompted only by a letter accusing Catholic Priests and others of satanic, ritualistic, child sexual abuse, detectives re-opened the investigation of the April 5, 1980 murder of an elderly Catholic Nun, Sister Margaret Ann Pahl, and set out to develop a contemporary Catholic occult theory of the case. Pet. App. A-14, A-15 at ¶ 29. On May 3, 2004 – 24 years after the homicide of Sister Pahl – the State indicted Petitioner, Father Gerald Robinson. *Id.* A-2 at ¶ 2.

An Incredible Theory

The State's "cold-case" theory was that a meek, mild mannered, Polish Catholic Priest, abandoned his lifetime commitment to his God to commit an occult-driven, ritualistic, sadomasochistic, murder in the presence of the Holy Eucharist on one of the holiest days on the Catholic calendar – Holy Saturday. *Id.* A-98 at ¶ 230. According to the prosecutors, because Father Robinson had previously expressed a desire to be a military chaplain, he was unsatisfied with the highest calling of the Priesthood – counseling the sick and dying. *Id.* A-37 at ¶ 81. Thus, they claimed he carried his letter opener[3] from his room at Toledo's Mercy Hospital to the sacristy of the hospital chapel to commit a premeditated murder, involving 31 stab wounds, ligature strangulation, and an intentional sexual assault. According to the State's theory, this planned attack occurred between 6:50 a.m. and 7:30 a.m., on Easter

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[3] At trial, some State experts called this instrument a "dagger." Others referred to it as a "letter opener." It is in fact a saber-like souvenir, which is too dull and too thick to open letters.

Eve, when hospital employees were changing shifts and when worshippers were certain to be present in the chapel.

The "Cold-Case" Is Not The Old Case

2. The 1980 detectives and the Lucas County Coroner quickly ruled out premeditation and sexual assault as a motive for this crime, settling upon a theory supported by the evidence – this was an unpremeditated, impetuous, frenzied rage killing, committed by an angry insider with motive, who staged a sexual assault crime scene. *Id.* A-5 at ¶ 10, A-7 at ¶ 13.

The only contested issue in this wholly circumstantial case was the identity of the murderer. Critical to Father Robinson's theory of innocence was the evidence developed in 1980, much of which is lost. He, who is diminutive in stature, with very small hands, claimed that he could not have manually strangled the victim in the manner described by the deputy coroner who examined the victim's body at autopsy in 1980. Instead, he maintained the murderer was a person with great strength and very large hands. And he maintained that the only item taken from this crime scene and never found – a thin, sharp-edged, pair of sewing scissors – was in fact the murder weapon. He also maintained that the time of death was after 7:30 a.m., that he was in his room at Mercy Hospital until Sister Margaret Ann's superior summoned him to perform the Catholic sacrament of last rites at 8:20 a.m., and that he had absolutely no motive to kill the victim.

As in any murder case, the most crucial forensic evidence developed in 1980, were the factual

findings and opinions of the forensic pathologist who examined the body at autopsy within hours of the murder. Lucas County's most experienced pathologist, Dr. Renate Fazekas, concluded that the murderer manually strangled the victim from behind, and that the manual strangulation was in all likelihood performed "by an individual with large hands." *Id.* A-6 at ¶ 11.

Within days of the murder, the Nuns discovered that the scissors the victim was using to prepare the chapel for Easter Mass on the morning of the homicide were missing. In aid of the investigation, they provided the police with a pair of scissors very similar in sharpness and symmetry to the missing scissors. *Id.* A-11 at ¶ 20. Comparing the sample scissors to the stab wounds by puncturing the victim's flesh, Dr. Fazekas opined that the missing scissors "very well could have been the murder weapon." "But she would not say with 100% certainty." [4] *Id.* A-11, A-12 at ¶ 21.

Dr. Fazekas' external measurements of the stab wounds at autopsy pointed in the direction of a double-bladed very sharp instrument, unlike the single-bladed, dull letter opener. *Id.* More importantly, her internal measurements of the stab wounds described a death instrument that did not

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[4] By contrast, Dr. Fazekas' examination of the letter opener in late April of 1980 resulted only in a statement that it was "compatible" with the stab wounds. *Id.* A-12 at ¶ 22.

vary in width, unlike the letter opener, which does.[5] In addition, Dr. Fazekas opined that there was no sexual assault. Instead, she concluded the murderer staged a sexual assault crime scene to divert police attention. *Id.* A-7, at ¶ 13.

Margaret Warren, a receptionist at Mercy Hospital, punched in at 7:35 a.m., on April 5, 1980. She provided the police with critical evidence concerning the time of death. In 1980, Ms. Warren told the police that she heard "loud frantic footsteps" running away from this crime scene 15 minutes after she punched in at 7:50 a.m. *Id.* A-8, A-9 at fn. 4.

Father Jerome Swiatecki – the other priest in residence at Mercy Hospital – was the only person among 100 witnesses, interviewed by seven experienced homicide detectives in 1980, who pointed to Father Robinson as a possible suspect. Swiatecki was a huge man (250 - 260 lbs.) with great strength and large hands. *Id.* A-31 at ¶ 70. Thus, he had the means to strangle the victim in the manner described by Dr. Fazekas. He also fit the detectives' 1980 theory that this was a rage killing by an angry insider with motive. It was Father Swiatecki and not Father Robinson who shortened the April 4, 1980, Good Friday Services. *Id.* A-8 at fn. 3. This made the victim so angry that it reduced her to tears on Good Friday. *Id.* A-7, A-8 at ¶ 14. At this point, Sister Pahl

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[5] The "actual prejudice" analysis in the opinion below makes no mention of these critical, of record, identifying measurements, which support innocence.

told her housekeeper "she was going to speak with 'Father' about his proposed changes to the Easter Service." *Id.* A-37, A-38 at ¶ 83. Some 12 hours later, she was dead.

The 1980 detectives could not verify Swiatecki's whereabouts between 7:30 a.m. and 7:50 a.m. on April 5, 1980. Indeed, his alibi, during this critical timeframe, is still unknown. And because of his familiarity with the crime scene (a very small sacristy), it was he who conducted its inventory on the morning of the murder. But in a bloody murder case involving 31 stab wounds, he did not tell the police that the sewing scissors used by the Nuns to prepare the chapel for Mass were missing.

For his part, Father Robinson cooperated fully with the investigators' requests in April of 1980. Not one of the witnesses interviewed in 1980 said they had seen Father Robinson at any time prior to 8:25 a.m., when he arrived to administer the sacrament of the last rites. And not one could offer the detectives any reason why he would want to murder the victim.

In 1980, when all of the forensic and occurrence witnesses were alive, when all of the forensic, physical, and documentary evidence was available, and when memories were clear, the then-Lucas County Prosecutor evaluated the evidence, and concluded he had no case against Father Robinson. *Id.* A-13, at ¶ 24. And the only new evidence, previously unavailable in 1980, was DNA testing, all of which excluded Father Robinson as a suspect. *Id.* A-25, A-26, A-27 at ¶¶ 57-62.

3. Several critical witnesses with information supporting Father Robinson's innocence died during the 24-year delay. Most importantly, Dr. Fazekas had died. Thus, the defense could not compel her attendance at trial and present her live expert testimony. If the jury believed her contemporary observations about the stab wounds, the murder weapon, the manner of strangulation, and the absence of a sexual assault, Father Robinson would have been acquitted. Making matters worse, the State lost the sample scissors, which formed the basis of Dr. Fazekas' opinions. Therefore, the sample scissors were unavailable for the defense to examine pre-trial or use in cross-examining the State's experts. They also could not be presented to the jury to evaluate and compare with the letter opener or clay impressions of the letter opener, which the State introduced in support of its theory of guilt. *Id.* A-22 at ¶ 49. Adding to Father Robinson's dilemma, by 2004, the victim's skin had fully decomposed so that the stab wounds were incapable of external or internal forensic examination.[6] Thus, Dr. Fazekas was the only person with first-hand knowledge of the critical identifying dimensions of the stab wounds. And she

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[6] The State exhumed the body after indictment in 2004. But the State experts could only examine seven indentations in the victim's bone. Three were determined to be "consistent" with the letter opener.

was the only person who could explain her 1980 factual findings and opinions to the jury.

Ensuring prejudice at trial, the State impeached Dr. Fazekas' opinion that there was no sexual assault, her opinion that this was a staged crime scene, her opinion of manual strangulation, and her opinion that the missing scissors were likely the murder weapon. *Id.* A-35, A-36, A-15, A-16, A-21 at ¶¶ 79, 31, 47, respectively. Of course, since Dr. Fazekas was dead, and since the victim's body had fully decomposed by 2004, there was absolutely no way for the jury to evaluate the veracity of her 1980 findings or opinions. And there was no way for the defense to rebut the powerful live testimony the State presented to impeach Dr. Fazekas' credibility and findings.

Due to the passage of time, Margaret Warren was also dead. Therefore, the jury could not assess her credibility or the factual circumstances surrounding her 1980 first hand observation that she heard "loud frantic footsteps" running away from this crime scene at precisely 7:50 a.m. Ms. Warren's account was critical for two reasons. First, it meant that Father Swiatecki, who had no alibi after 7:30 a.m., who had upset the victim on the day before her death, and who had the means to manually strangle her in the manner described by Dr. Fazekas, also had the opportunity to commit this homicide. Second, Ms. Warren's contemporary account directly contradicted the time of death trial testimony of two State witnesses.

Father Swiatecki had also died by 2004, and the State lost or destroyed all of his 1980 statements. Compounding the trial prejudice, the memories of the 1980 detectives, whom had retired, had faded to the point that the State did not even call them as witnesses. *Id.* A-100 at ¶ 236. Swiatecki's death, the loss of his statements, combined with the faded memories of the 1980 detectives, deprived the jury any ability to assess his alibi, his lack of a factual basis for accusing Father Robinson, and his motive to kill. No one will ever know why he was the only person to point to Father Robinson. No one will ever know if he diverted attention from himself by not disclosing the missing sewing scissors. More importantly, no one will ever know what he did to upset Sister Pahl on Good Friday – just one day before her death.

Adding fuel to the fire, the State also lost or destroyed all of Father Robinson's 1980 statements. *Id.* A-2, A-3 at ¶ 4. The State capitalized on this loss by presenting testimony from the detectives who interviewed Father Robinson in 2004 and claimed that his 2004-videotaped statements were inconsistent with his 1980 oral statements. Due to the loss of these documents, and the faded memories of the 1980 detectives, Father Robinson had no opportunity to assess his right to testify. And he had no opportunity to challenge the 2004 detectives' testimony by means of cross-examination or even point out consistencies between the two sets of

statements. These inferences of guilt were un-rebuttable.

When viewed through the prism of the State's weak circumstantial evidence on the element of identity, the prejudice caused by delayed justice in this case was outcome determinative. Here, state-of-the-art DNA testing produced the profile of an unknown male contributor to this crime scene. *Id.* A-25, A-26, A-27, at ¶¶ 57-62. But all DNA testing excluded Father Robinson as that contributor. *Id.* Ohio BCI bloodstain pattern analysis on a bloody crime-scene altar cloth found no link between the bloody imprints on the altar cloth and Father Robinson's letter opener.[7] Ohio BCI DNA testing for blood on the letter opener, found no DNA and thus, no blood. *Id.* A-13 at ¶ 27.

Three world-renowned experts, hired by the State after indictment, could not identify the letter opener as the murder weapon to a reasonable degree of scientific certainty. In fact, the world's foremost forensic scientist, Dr. Henry Lee, when pressed to answer if the "letter opener" was the murder weapon, said, "all I can conclude is similar to. Could be.[8] There were no eyewitnesses to this crime. There was

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[7] In assessing the strength of the State's admissible evidence, the "actual prejudice" analysis in the opinion below makes no mention of this, of record, exculpatory forensic evidence.

[8] Dr. Lee's inconclusive of record opinion is also conspicuously absent from the "actual prejudice" analysis in the opinion below.

no confession. There was no believable evidence of motive.

It Was Father – In The Sacristy – With The Letter Opener

4. The cold-case detectives who resuscitated this investigation manufactured a case in 2004, when they had none in 1980. First, they hired experts and "re-interviewed" witnesses to impeach the 1980 evidence. The State relied upon the expert testimony of a forensic pathologist, the testimony of a 90-year-old witness, and the expert testimony of a doctoral student, who manufactured a contemporary Catholic occult theory of guilt. Then, the detectives obtained videotaped statements from Father Robinson after conducting a custodial "ask-first" interrogation in contravention of the strictures of *Miranda*, and used those videotaped statements to implicate him.[9]

The cornerstone of the State's case was the testimony of one of its own – Toledo Cold Case Squad Member, Dr. Diane Scala-Barnett. Based upon her examination of one of the seven defects in the victim's

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[9] The trial court denied a pre-trial motion to suppress, finding that Father Robinson was not in "custody" during the "ask-first" session under *Miranda v. Arizona*, 384 U.S. 436 (1966), *Id.* B-7 – B-14, and the appellate court affirmed. The *Miranda* determination is in issue, because a reviewing court must weigh the prejudice suffered against only the Government's admissible evidence when assessing "actual prejudice" under *Lovasco*. *See State v. Luck*, 472 N.E.2d 1102 (1984) (applying *Lovasco*).

decomposed bone, she said the "letter opener," or "an instrument exactly like it," was the murder weapon. *Id.* A-21 at ¶ 47. Since Father Robinson was in exclusive control of the letter opener, this opinion meant that he was the only person who could have committed this crime. And contrary to Dr. Fazekas' 1980 manual strangulation opinion and her contemporary findings in support of that opinion, Barnett said "soft ligature strangulation," was involved. *Id.* A-15, A-16 at ¶ 31. This opinion meant that a very small person, with small hands, like Father Robinson, had the means to strangle the victim.

Sister Madelyn Gordon testified for the State to impeach Margaret Warren's 1980 account of hearing the "loud frantic footsteps" at 7:50 a.m. Sister Gordon recalled that she entered the chapel at approximately 7:30 a.m., and that she remained there until she discovered the body in the sacristy at 8:20 a.m. *Id.* A-28, A-29 at ¶ 65. This supported the State's theory of the time of death (before 7:30 a.m.).

Suitably rounding off their contemporary theory in a fashion reminiscent of the infamous Salem Witch Trials of the 17th Century, the prosecutors relied upon the occult to prove guilt. Father Jeffrey Grob, a self-proclaimed exorcist, told the jury that "tarot cards and horoscopes" were part of his expertise, which, in his words, involved counseling people "who believe they are possessed" by the devil. *Id.* A-81 at ¶ 184. Even though there was no evidence that Father Robinson believed in the

occult or that he ever acted upon such a belief in the past, Grob opined to a reasonable degree of "religious certainty" that, because of what he viewed as the crime scene's occult characteristics, the killer had "specialized knowledge of the rituals of the Catholic Faith." *Id.* A-35, A-36 at ¶ 79. "Certainly a priest would have that kind of knowledge," he said. *Id.* According to Grob, the time, place, and location implicated the occult. He said a blood smear on the victim's forehead was a "satanic mockery" of the sacrament of last rites. He called the killer's evil hand motivation "mockery reversal" intended to mock the "bride of Christ," the "Catholic Church," and "God." *Id.* A-78, A-79 at ¶ 179, A-81 at ¶¶ 183-86.[10] And based upon Dr. Fazekas' finding of a "minor scratch just inside" the victim's "vagina," which she concluded, "could have been caused by a fingernail or rough instrument," Grob opined that the killer sexually assaulted Sister Pahl. *Id.* A-35, A-36 at ¶ 79.

Father Grob's sensational testimony amounted to nothing more than a vehicle for the prosecutors to demonize Father Robinson in summation, and link him and the Catholic Faith to the occult. There, they suggested that Father Robinson used his letter

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[10] The trial court admitted Father Grob's inherently unreliable occult profile over objection. And the appellate court found its admission constitutionally permissible, reasoning that it was like the science of "accident reconstruction." *Id.* A-80 at ¶ 181. For the reasons mentioned above, *see* fn. 9, these determinations are also in issue.

opener to anoint the victim in her own blood in a "bastardized" version of the last rites and to "penetrate" her with its blade. And they remarked: "if the victim were Jewish, he would have carved a Swatiska on her chest." *Id.* A-39 at ¶ 87. Accordingly, the prosecutors exhorted the jury to convict to provide "justice for the 'bride of Christ.'" *Id.* A-46 at ¶ 105.

The Hobson's Choice

5. The death of Dr. Fazekas, the loss of the sample scissors she examined, the decomposition of the victim's body, the death of Margaret Warren, the death of Father Swiatecki, the loss or destruction of Swiatecki's 1980 statements, the loss or destruction of Father Robinson's 1980 statements, and the loss of the memories of the 1980 detectives, presented Father Robinson's lawyers with a Hobson's choice at trial. Certainly, they could try to defend without the missing evidence. But this choice meant they could not counter any of the key components of the State's case: the letter opener as the murder weapon and not the missing scissors, soft ligature strangulation and not manual strangulation by an individual with large hands, a time of death before 7:30 a.m. and not after, and an intentional sexual assault motivated by the occult and not a staged crime scene. On the other hand, they could defend by attempting to introduce some of the missing evidence in the form of testimonial hearsay contained in 1980 police reports. But this choice opened the door to the introduction of inculpatory testimonial hearsay, in contravention of

the right of confrontation. And it certainly ensured a finding of the waiver of Father Robinson's right to confrontation on appeal. *Id.* A-4 at fn. 1. Concluding that a partial hearsay defense was preferable to no defense at all, Father Robinson's lawyers opted for the latter, by convincing the trial judge to admit 1980 documents under the ancient documents exception to the hearsay rule. *Id.*

But due to the passage of time, the only hearsay documents available in 2006, were Dr. Fazekas' very brief unexplained opinions recited in three police reports, a rough sketch of the sample scissors, Ms. Warren's two-sentence statement, and Dr. Fazekas' seven page autopsy report. Thus, the jury received Dr. Fazekas' findings and opinions, her critical mathematical measurements of the stab wounds, the sample scissors she examined in 1980, and Margaret Warren's first-hand 1980 observations in the form of 12 pieces of paper. By contrast, the testimony of Dr. Barnett, Father Grob, Sister Gordon, and the cold-case detectives consumed more than a week of trial.

The jury took less than a business day to return a guilty verdict. Father Robinson was immediately sentenced to 15 years to life imprisonment. *Id.* C-1, C-2.

No Harm – No Foul

6. On direct appeal, Father Robinson maintained that he suffered actual prejudice to his ability to defend himself, due to the 24 years of

pre-prosecution delay.[11] The Ohio appellate court held that lost or destroyed evidence that impeaches the Government's case on an essential element of the crime charged cannot establish "actual prejudice," under *Lovasco*. *Id.* A-71 at ¶ 161. In order for a due process claim to ripen under *Lovasco*, the lower court required that evidence lost or destroyed due to the unexplained passage of time, must "prove[] the defendant's asserted defense." *Id.* A-51 at ¶ 121. This standard goes further than any state or federal court requires.

Additionally, the court found that – no matter the prejudice suffered – the loss of only one witness cannot meet the "actual prejudice" standard of *Lovasco*. *Id.* A-54, A-55 at ¶ 128. The opinion below also inserts the following substantive terms into the constitutional standard not used by this Court in *Lovasco*: "prejudice will not be found due to the lack of non-exculpatory evidence," and the moving party must produce "concrete" proof of "substantial" prejudice. *Id.* A-50, A-51 at ¶ 121.

The Ohio appellate court found no "actual prejudice" under this standard, reasoning "the

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[11] Father Robinson's lawyers asked the trial court to dismiss the indictment on due process grounds, because of the loss of evidence. *Id.* at B-4. After conducting an evidentiary hearing, the court denied the motion, citing *State v. Bruce*, No. 02CA40, 2003 WL 1756433 (Ohio Ct. App. Apr. 3, 2003) (interpreting *Lovasco*, and finding no actual prejudice). *Id.* at B-5.

missing evidence here went to the credibility of the State's evidence," a matter that was, in the court's counter-intuitive view, "best left for trial." *Id.* A-71 at ¶ 161.

Reasons for Granting the Petition

This case is cert-worthy for three reasons. First, the threshold due process question of when a pre-prosecution delay claim is ripe for adjudication has not been, but should be, settled by this Court. Second, the opinion below conflicts with this Court's settled Fifth and Sixth Amendment precedent. Third, this case is of public and great general interest.

I. The threshold due process question of when a pre-prosecution delay claim is ripe for adjudication has not been, but should be, settled by this Court.

Recognizing that delayed justice may in fact deny justice, the *Lovasco* Court articulated a two-part test to define the role of the Due Process Clause in cases of pre-prosecution delay. Under the first prong, a due process claim is concrete and ripe for adjudication when the accused demonstrates "actual prejudice" to his or her defense. Upon this demonstration, a court adjudicates the claim, under the second prong, by examining the Government's

justification for the delay to determine if the Due Process Clause is violated.[12]

But the majority opinion in *Lovasco* did not define the terms "actual prejudice," address the type of evidence and quantum of proof necessary to meet that threshold, and did not address the merits of the circuit court of appeals' finding of "actual prejudice" there.[13] And the *Lovasco* Court did not discuss the circumstances under which a pre-prosecution delay violates the Due Process Clause, did not decide who has the burden of proof under the second prong, and did not address the interplay between the two prongs of the test.

Thus, the *Lovasco* Court left the task of defining the critical triggering event under the first prong – "actual prejudice" – and the task of weighing the ultimate due process question under the second prong – "the justification for the delay" – to the lower

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[12] As stated above, the lower court, in error, found no "actual prejudice" under the first prong of *Lovasco*. Thus, if this Court reverses, it may examine the legitimacy of this prosecution, under the second prong of the test – a question that has also deeply divided the lower courts. *See* § I. A., below.

[13] In *Lovasco*, the lower federal courts found "actual prejudice" due to the loss of the potentially exculpatory testimony of 2 witnesses. *United States v. Lovasco*, 532 F.2d 59 (8th Cir. 1976), *rev'd*, 431 U.S. 783 (1977). And in dissent in *Lovasco*, Mr. Justice Stevens would have affirmed that finding. 431 U.S. at 797 (Stevens, J., dissenting).

courts. As the predictable consequence of a lack of guidance from this Court, the lower courts are now in significant disagreement on the meaning of both prongs of the *Lovasco* test. Indeed, the practical effect of 32 years of judicial uncertainty means, as Mr. Justice White observed some 21 years ago, that liberty, in pre-prosecution delay cases, depends upon the happenstance of venue.[14]

A. Application of the *Lovasco* test is not uniform.

Application of *Lovasco* in the federal courts has produced results that are not uniform in factually analogous cases for one straightforward reason. The majority of the circuit courts, in error, interpret *Lovasco* to mean that no matter the amount of harm caused by delayed justice, the Due Process Clause is never violated in the absence of proof of an improper prosecutorial motive, designed to gain a tactical advantage or advance some other improper purpose.[15]

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[14] *See United States v. Hoo*, 484 U.S. 1035 (1988) (White, J., dissenting from denial of certiorari); *see also Howell v. Barker*, 498 U.S. 1016 (1990) (noting Justices White and Kennedy's votes to grant certiorari).

[15] *See, e.g., United States v. Ingram*, 446 F.3d 1332, 1336-1339 (11th Cir. 2006); *United States v. Haskell*, 468 F.3d 1064, 1070 (8th Cir. 2006); *United States v. Avants*, 367 F.3d 433, 441-442 (5th Cir. 2004); *United States v. Beckett*, 208 F.3d 140, 150-151 (3rd Cir. 2000); *United States v. Kendrick*, 221 F.3d 19, 33 (1st Cir. 2000).

Thus, in these jurisdictions there is no need to assess prejudice, absent record proof of prosecutorial misconduct. Consequently, some of these courts routinely skip the prejudice analysis altogether and deny motions to dismiss in the absence of proof of misconduct. This explains why, even after 32 years of litigation, there is a dearth of analysis on the actual prejudice prong of the test.

The minority, and better-reasoned view, relies upon the recognition that Due Process Clause interpretation requires a delicate balanced prejudice analysis. Under this view, intentional prosecutorial misconduct is not required for finding a due process violation. Instead, this approach holds that the proper inquiry is to balance the prejudice suffered by the accused, under the first prong, against the Government's justification for the delay, under the second prong.[16] And while the majority of the federal courts require a defendant to prove the Government's improper motive, the Fourth and Seventh Circuit Courts of Appeal, and a significant number of the state supreme courts, disagree. Upon a showing of "actual prejudice," these courts shift the burden to

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[16] *See, e.g., United States v. Sowa*, 34 F.3d 447 (7th Cir. 1994); *Howell v. Barker*, 904 F.2d 889 (4th Cir. 1990); *State v. Knickerbocker*, 880 A.2d 419 (N.H. 2005); *State v. Whiting*, 702 N.E. 1199 (Ohio 1998); *State v. Brazell*, 480 S.E.2d 64 (S.C. 1997); *Gonzales v. New Mexico*, 805 P.2d 630 (N.M. 1991); *State v. Cyr*, 588 A.2d 753 (1991); *State v. Dixon*, 792 P.2d 137 (Wash. 1990).

the Government to prove that its reasons for the delay outweigh the prejudice suffered by the accused.[17] But a review of the federal and state cases, where the first prong of *Lovasco* is routinely addressed on its merits, evinces a deep divide on the very meaning of the terms "actual prejudice."

B. The meaning of the first prong of the *Lovasco* test is not settled.

On one end of the constitutional spectrum, the outer limits of the "actual prejudice" standard are clear. State and federal courts agree on the uncontroversial proposition that the first prong of *Lovasco* is not satisfied by vague and generalized assertions that lost witnesses, lost documents or faded memories impaired a defense.[18] Rather, courts uniformly require a defendant to specifically articulate how the lost evidence or witness would assist the defense; a defendant's mere speculation as to the content of the lost witness testimony or evidence, will not suffice. Otherwise, virtually any delay would raise due process concerns, because a defendant can always make an argument that he or

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[17] *See* fn. 16 above.

[18] *See, e.g.*, *United States v. Mmahat*, 106 F.3d 89, 94-95 (1st Cir. 1997); *United States v. Johnson*, 120 F.3d 1107, 1110 (10th Cir. 1997); *State v. Crail*, 35 P.3d 197, 205 (Haw. 2001); *State v. Rippy*, 626 A.2d 334, 339 (Me. 1993); *Phillips v. State*, 835 P.2d 1062 (Wyo. 1992).

she could have used potential evidence or witnesses that are unavailable.

But across the rest of the spectrum, the federal and state courts are far from uniform in articulating how a defendant actually establishes prejudice sufficient to meet the first prong of *Lovasco*. The distinct trend in federal jurisdictions places questionable limitations on the conditions under which prejudice will be found.[19] For example, many courts, like the court below, inject additional terms in their description of the prejudice analysis, which in practical terms then impose additional quantum of proof requirements not contemplated by *Lovasco*. Some courts require a showing of "substantial and actual prejudice" without explaining how to meet this seemingly higher standard.[20] In this case, a showing of "substantial prejudice" and "concrete proof" was required. But this Court described the first prong of

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[19] *See, e.g.*, *United States v. Martinez*, 77 F.3d 332, 335 (9th Cir. 1996) ("The task of establishing the requisite prejudice . . . is so heavy that we [previously] have found only two cases since 1975 in which any circuit has upheld a due process claim") (quoting and citing *United States v. Huntley*, 976 F.2d 1287, 1290 (9th Cir. 1992)).

[20] *See, e.g.*, *United States v. Jackson*, 446 F.3d 847, 849 (8th Cir. 2006) (actual and substantial); *United States v. Crouch*, 84 F.3d 497 (5th Cir. 1996) (en banc) (same); *State v. Lemming*, 937 P.2d 381 (Ariz. App. Div. 1997) (same); *State v. Alexander*, 708 A.2d 770 (N.J. Super. Ct. App. Div. 1998). (same); *Phillips v. State*, 835 P.2d 1062 (Wyo. 1992) (substantial prejudice).

the due process analysis as simply requiring proof of "actual prejudice" – in literal terms, "real harm."

These additional adjectives are not just hyperbole. They have real practical impact on how a defendant establishes prejudice under *Lovasco*. For sure, it is one thing to require a defendant to articulate what the lost testimony would have been and to explain how the missing evidence would have helped his or her defense, relying on information and evidence available in the record, where possible.[21] *Lovasco* contemplated this degree of proof and level of specificity, because it prevents defendants from

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[21] *See, e.g.*, *Manning v. Bowersox*, 310 F.3d 571, 578 (8th Cir. 2002) (death of 3 witnesses during 6½ year delay, constituted actual prejudice as defendant would have been better prepared had these witnesses been available for questioning); *United States v. Barket*, 530 F.2d 189 (8th Cir. 1976) (affirming dismissal for pre-indictment delay where defendant articulated how dead witnesses would have aided his defense); *United States v. Alderman*, 423 F. Supp. 847 (D. Md. 1976) (finding actual prejudice where defendant produced affidavit of three witnesses who could not remember critical events because of lengthy delay); *State v. Lee*, 602 S.E.2d 113 (S.C. Ct. App. 2004) (destruction of records during 12 year delay constituted actual prejudice, because it impaired the right to effective cross-examination), *Gonzales v. New Mexico*, 805 P.2d 630 (N.M. 1991) (the actual prejudice showing need not rise to the level of severe prejudice, but must establish that the prejudice impacted the defense); *State v. Luck*, 472 N.E.2d 1097 (1984) (finding actual prejudice from loss of alibi witness who could have corroborated defendant's self-defense theory and minimized impact of state's case).

making bald assertions of prejudice without any explanation of the exculpatory value of the lost evidence, and because it assists a reviewing court in making the prejudice assessment. But it is quite another to require, as many courts do, a greater quantum of proof and greater specificity than that.

Indeed, several examples of heightened proof requirements emerge from a survey of the federal and state cases addressing actual prejudice claims. For example, some courts, without explanation, render the standard nearly insurmountable by requiring "definite" actual prejudice.[22] Others question whether exculpatory "lost testimony can ever constitute actual prejudice."[23] Many courts dismiss due process claims based on missing documentary and physical evidence out of hand, reasoning that the defendants' claims were speculative because they could not prove that the lost evidence would have actually helped their defense. This is so, even in cases where the destruction of the evidence itself made it impossible for the defendant to prove any such thing.[24] Other courts recognize the inherent unfairness of this type

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[22] *United States v. Rogers*, 118 F.3d 466, 477 n.10 (6th Cir. 1997).

[23] *United States v. Ross*, 123 F.3d 1181, 1185 (9th Cir. 1997).

[24] *United States v. DeGeorge*, 380 F.3d 1203, 1212 (9th Cir. 2004) (defendant could not prove prejudice due to destruction of a vessel).

of circular reasoning.[25] And some appellate courts require trial courts to defer rulings on *Lovasco* motions until after trial, reasoning that any pre-trial motion to dismiss, in a *Lovasco* case, is per-se speculative.[26]

In lost witness cases, some courts require defendants to produce some form of independent written verification of what the lost testimony would have been (in the form of a deposition or other sworn statement), stating that such corroboration is required to ensure the defendant's allegations are not speculative.[27] Thus, without the precipitous event of having obtained a sworn prior statement as to what a dead witness would say, at a time (sometimes

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[25] *Barnett v. State*, 867 N.E.2d 184 (Ind. Ct. App. 2007); *State v. Brown*, No. 98CA25, 2000 WL 303142 (Ohio Ct. App. Mar. 17, 2000).

[26] *United States v. Crouch*, 84 F.3d 1497, 1523 (4th Cir. 1996); *State v. Knickerbocker*, 880 A.2d 419 (N.H. 2005).

[27] *See, e.g.*, *United States v. Davis*, 598 F. Supp. 453 (S.D.N.Y. 1984) (no prejudice found because of lack of corroboration of witness' testimony, such as a deposition); *Shiro v. State*, 888 N.E.2d 828 (Ind. Ct. App. 2008) (no prejudice found where there was no affidavit or deposition supporting defendant's assertion). *But see United States v. Sample*, 565 F. Supp. 1166, 1177 n.17 (E.D. Va. 1983) (finding prejudice where dead witness was critical to defendant's theory of innocence, even though his deposition testimony was available to the *defendant*, and recognizing that "how a witness testifies is at least equally important as what he says").

decades before) when there is no reason to obtain such a statement, defendants in such jurisdictions are out of luck. Other courts have gone even further, requiring a defendant to not only prove the contents of the lost testimony and its materiality, but also to convince the court that the dead witness was credible, that he or she would have testified at trial, withstood vigorous cross-examination, and been believed by the jury.[28]

Finally, a few courts, such as the appellate court below, eschew claims of prejudice stemming from the loss of critical defense witnesses where portions of the missing witnesses' testimony are available in some form of hearsay, without any consideration of the probative value that live testimony has upon a jury under the circumstances. But other courts recognize that this result stretches the concept of duplicative evidence to an illogical extreme where the physical presence of live witnesses at trial is as critical to innocence as the content of the documents themselves.[29]

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[28] *E.g.*, *United States v. Spears*, 159 F.3d 1081, 1085 (7th Cir. 1998); *United States v. Rogers*, 118 F.3d at 475; *State v. Dunlap*, 930 P.2d 518 (Ariz. App. Div. 1996).

[29] *Sample*, 565 F. Supp. at 1177 n.17; *People v. Boysen*, 62 Cal. Reptr.3d 350, 362 (Cal. App. 4th Dist. 2007) (court found actual prejudice from death of defense alibi witness; although her statement was admissible at trial, defendant had no opportunity to rehabilitate her testimony).

The results in these cases demonstrate the need for this Court's clarification of the parameters of the first prong of the *Lovasco* test. Requiring more than a clear explanation, grounded in evidence, as to how lost testimony, physical evidence or documents are exculpatory and would assist a defense, places an impossible burden on the proponent. It is precisely because the evidence or testimony is unavailable, unevaluated, and unobtainable elsewhere that its proponent cannot conduct an investigation and show additional proof of content, materiality, strength, and believability. In any event, such restrictions upon due process rights go far beyond that required to foster the policies underlying the *Lovasco* "actual prejudice" rule.

C. This case provides the opportunity to establish a meaningful and predictable guideline for the lower courts to follow.

The law of this case elevates the first prong of the *Lovasco* test to a new untenable, virtually insurmountable legal standard, where a due process pre-prosecution delay claim never ripens when lost evidence impeaches a circumstantial case on the only issue at trial – in this case, the identity of the murderer. The lower court's conclusion that evidence that impeaches the credibility of a weak circumstantial case cannot establish "actual prejudice," because it does not "prove a defense" misses the point of *Lovasco* and defies reason and common sense. Put simply, missing evidence, which assists in effectively cross-examining a Government

witness or otherwise diminishes the credibility of a weak circumstantial case, by definition, must meet the "actual prejudice" standard. If not, then contrary to *Lovasco*, the Due Process Clause plays no role in protecting against oppressive pre-prosecution delay. The law of this case is so wrong that it provides a clear basis to clarify the first prong of the *Lovasco* test.

This case also presents the rare opportunity to clarify the "actual prejudice" standard in the context of a factual record unlike that of *Lovasco* and unlike that of the overwhelming majority of pre-prosecution delay cases.[30] Here, the missing evidence is exculpatory, rather then potentially exculpatory, the harm suffered is real and not speculative, prejudice is discernable from a trial record and not a pre-trial record, and the admissible circumstantial evidence of guilt is weak.

There can be little dispute that the lost evidence in this case was material to innocence and probative of third-party guilt. Dr. Fazekas' expert testimony, the sample scissors, the stab wounds she examined in 1980, and Ms. Warren's 1980 observations alone contradict the State's entire case on the key element of identity, by powerfully pointing to a different murder weapon, a different means of strangulation, a different time of death, and the

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[30] *E.g. United States v. Barken*, 412 F.3d 1131, 1134 (9th Cir. 2005) (noting that burden of proving prejudice is "rarely met").

absence of any sexual component to this crime. And since the State impeached all of this lost evidence, the prejudice suffered due to its absence at trial is palpable.

Furthermore, because the State's trial evidence tended to exclude Father Swiatecki, who had upset the victim on the day before her death, and who had the means to kill in the manner described by Dr. Fazekas, his death, the loss of his 1980 statements and the loss of the memories of the 1980 detectives meant that he had an un-rebuttable alibi. Moreover, the loss of Father Robinson's 1980 statements, coupled with the dimmed memories of the detectives, presented a significant impediment to his right to testify on his own behalf, and an inability to confront damaging testimony probative of his credibility, which the State placed directly in issue. The lost evidence here would have done much more than just significantly minimize the State's case. Indeed, Dr. Fazekas' live testimony alone would have raised a doubt, based upon reason and common sense, in the mind of any rational juror.

But the lost evidence of this case did not bother the Ohio appellate court. It found "no prejudice," because of the admission of Dr. Fazekas' opinions and findings in the form of hearsay, because of the admission of Ms. Warren's account in the form of another "testimonial" piece of paper, and because of the introduction of a rough 1980 sketch of the sample scissors. But these innocuous pieces of paper do nothing to advance Dr. Fazekas' or Ms. Warren's

credibility; they cannot explain the factual bases of critical expert opinions, post-mortem findings and critical measurements of stab wounds, and they cannot substitute for first-hand contemporary observations. Nor can they rebut the discrediting impeachment testimony the State put before the jury in this case. Only a live witness can. This hearsay – 26 years after the fact – was neither meaningful nor complete, in a constitutional sense.

Father Robinson's due process claim was ripe for adjudication under *Lovasco*. He demonstrated real harm to his ability to defend himself. Thus, the lower court should have adjudicated the due process claim under the second prong of the *Lovasco* test. This Court has that opportunity, in the context of a record where there is no legitimate reason for the near quarter of a century of delay between this crime and this indictment.

II. The opinion below conflicts with this Court's settled Fifth and Sixth Amendment precedent.

The right to a meaningful opportunity to present a complete defense has long been recognized by this Court's jurisprudence. As the Court stated in *California v. Trombetta*,[31] "whether rooted directly in the Due Process Clause, or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution provides a criminal

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[31] 467 U.S. 479 (1984).

defendant with a meaningful opportunity to present a complete defense." Most recently, this Court explained in *Holmes v. South Carolina*,[32] that this important right is abridged where rules of law are arbitrary and go beyond the purposes they are designed to serve. In *Holmes*, this Court condemned the South Carolina Supreme Court's interpretation of an evidentiary rule barring the defendant from introducing evidence of third-party guilt. There, the Court found that the lower court's interpretation "radically changed and extended the rule," in a way that was inconsistent with the defendant's right to present a complete defense. In *Holmes*, the lower court's ruling limited the defendant's use of evidence that would have impeached the state's evidence of guilt on the element of identity, if believed by the jury.

This Court's constitutional analysis relied upon in *Holmes* applies here, where the standard articulated for proving actual prejudice is "arbitrary" and does not serve the end that *Lovasco's* actual prejudice standard was designed to promote – that of preventing vague and speculative assertions of prejudice. By applying a standard requiring that lost or destroyed evidence must "prove a defense" in order to establish actual prejudice under *Lovasco*, the Ohio appellate court's ruling, in the *Holmes* Court's words, "radically changes and extends" the *Lovasco* rule.

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[32] 547 U.S. 319 (2006).

This heightened standard has the practical affect of nullifying valid due process challenges and forcing defendants to stand trial without access to evidence that would enable them to present a complete factual defense.

The constitutional principle relied upon in *Holmes* is also implicated by the lower court's application of *Lovasco* to the lost evidence in this case. As this Court recognized in *Holmes*, a defendant's use of evidence that tends to undermine the reliability of the state's evidence, such as the lost evidence in this case, is an indispensable part of a criminal trial. Yet the lower court's ruling – that the volume of impeachment evidence lost in this case worked no actual prejudice on Father Robinson's ability to defend himself – states just the opposite. The lower court's treatment of impeachment evidence as incapable of establishing actual prejudice under *Lovasco* means that the right to place the Government's case "under the crucible of meaningful adversarial testing,"[33] is no right at all. Indeed, if the Confrontation Clause commands anything it is "not only that evidence is reliable, but rather that reliability be assessed in a particular manner, by testing in the crucible of cross-examination."[34] Furthermore, the jury must serve as the "lie detector"

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[33] *United States v. Cronic*, 466 U.S. 648 (1984).

[34] *Crawford v. Washington*, 541 U.S. 36 (2004).

assessing the relevant, competent evidence."[35] The approach below gives no recognition to these principles, the presumption of innocence, or the right to compulsory process. It is the very fact that the jury in this case had no ability to assess the dead witnesses' veracity or the live witnesses' credibility that rendered Father Robinson's defense neither meaningful nor complete.

III. This case is of public and great general interest.

This case raises an issue of far-reaching national importance. One need only watch television and read the daily newspapers to conclude that the increasing frequency of the formation of "cold-case divisions" nationwide, and the application of modern scientific principles and techniques to investigate crimes that occurred in decades past, give widespread public impact and contemporary significance to the question presented.

Literally, every state in the union and every large metropolitan police force now have "cold-case units." Recognizing the legitimate need of law enforcement to pursue unresolved criminal investigations, the Justice Department has long authorized the expenditure of millions of dollars of taxpayer funds in the form of grants to the states for this purpose. Similarly, the President recently signed

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[35] *United States v. Scheffer*, 523 U.S. 303, 313 (1998).

into law authorization for the Justice Department and the FBI to reopen, investigate, and prosecute Civil Rights Era crimes occurring before January 1, 1970.[36]

Therefore, one thing is certain. The question of when pre-prosecution delay claims are ripe for adjudication, under *Lovasco*, will be the subject of recurring litigation in the state and federal courts for many years to come. The lower courts, law enforcement, and all citizens affected deserve an answer to the question presented in this case.

Conclusion

Mr. Justice Brandeis put it this way: "experience should teach us to be most on guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."[37]

What smacks of a violation of every sense of fair play and decency in this due process case is the extraordinary, unexplained pre-prosecution delay involved, the resulting loss of exculpatory evidence, the unrelated Catholic Clergy child sexual abuse

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[36] Pub. L. No. 110-344, 28 U.S.C. § 509 (2008) (Emmett Till Unresolved Civil Rights Crime Act of 2007).

[37] *Olmstead v. United States*, 277 U.S. 438, 479 (1925) (Brandeis, J., dissenting).

motivation for re-opening this 1980 case, and the indisputable fact that this is not a situation where previously unavailable evidence or new technology "cracked" a "cold" criminal case. Instead, it is one where the state of Ohio decided to hire expert witnesses, after indictment in 2004, to put a new spin on circumstantial evidence, all of which was available to it in 1980 or at any time thereafter.

If this Court does not intervene, no court will ever have the power to evaluate the legitimacy of this prosecution, and determine if, under the circumstances, the state of Ohio violated the Due Process Clause. For that reason and the reasons discussed above, this Court should review this important case on its merits.

Respectfully submitted,

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